

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

PATRICIA TARLE,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HEALTH
PLAN, INC., et al.,

Defendants and Respondents.

B224739

(Los Angeles County
Super. Ct. No. BC382696)

APPEAL from a judgment of the Superior Court of Los Angeles County,
David L. Minning, Judge. Judgment is reversed.

The Mathews Law Group and Charles T. Mathews; Law Offices of
Roxanne Huddleston and Roxanne Huddleston; The Rager Law Firm and
Jeffrey A. Rager for Plaintiff and Appellant.

Reed Smith and Deborah J. Broyles; Cole Pedroza, Kenneth R. Pedroza and
Joshua C. Traver for Defendants and Respondents.

* The opinion is certified for publication with the exception of section 2 of the Discussion.

Plaintiff and appellant Patricia Tarle appeals from the summary judgment entered in favor of defendants and respondents Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc. (collectively, Kaiser), Dilip Sedani and Wayne Rupnik in this employment discrimination action. Tarle contends the trial court erred in sustaining defendants' evidentiary objections to much of the evidence she submitted in opposition to the summary judgment motion (and that such evidence raises a triable issue of material fact). However, Tarle never provided to the trial court any oral or written opposition to the bulk of defendants' objections. This case, therefore, raises the issue of whether, in the context of a summary judgment motion, a party must provide the trial court with such opposition to an opponent's objections or be barred from challenging on appeal the trial court's order sustaining the objections. Although this precise issue appears to be one of first impression, we conclude that existing law compels the result that a failure to provide such opposition to the trial court on summary judgment bars a party from challenging on appeal the trial court's order sustaining the unopposed evidentiary objections. In the unpublished portion of this opinion, we determine that, as both parties are responsible for substantial flaws in the summary judgment briefing in this case, the proper procedure is to remand with directions for a properly-briefed summary judgment motion.

FACTUAL AND PROCEDURAL BACKGROUND

As we will not ultimately resolve the merits of defendants' summary judgment, the underlying facts can be quickly summarized. Tarle was employed by Kaiser. Her immediate supervisor was Rupnik; Rupnik's supervisor was Sedani. However,

Rupnik's office was in northern California, while plaintiff worked in the same office as Sedani in southern California. Tarle alleges that Sedani mistreated her on the basis of her gender. Although she does not allege that Sedani made any sexually-based comments or express references to her gender, Tarle alleges that Sedani's mistreatment was gender-based. Tarle supports this conclusion with evidence that Sedani mistreated other women, but treated men in similar positions much better. Tarle alleges that Sedani's mistreatment included: publicly and privately berating her; yelling; throwing papers at her; repeatedly slamming a book on the table while she was attempting to give a presentation; moving into her "personal space" while talking angrily; minimizing the accomplishments of her all-female team; finding fault with women where men were excused for similar mistakes; failing to give her an office when all men at her level had offices; and failing to provide her and her team with necessary equipment provided to men. Tarle alleges that she and other women complained; their complaints were uniformly ignored or determined to be unfounded by Kaiser. At one point, after Tarle had filed a Department of Fair Employment and Housing (DFEH) complaint against Sedani, Rupnik prepared a performance review of Tarle in which she received several low ratings for her ability to work within the department; she was specifically identified as "too often let[ting] her emotions control her decision making process" and was directed to improve her "emotional intelligence." Tarle believed this review to be discriminatory and retaliatory. Tarle also believed that she was retaliated against by being excluded from meetings which were necessary for her job. Tarle ultimately

resigned her position at Kaiser, when there was no change in Sedani's conduct and Kaiser's internal investigation dragged on for months with no result.¹

In response, defendants argue that Sedani might have had a difficult management style, but he treated men and women equally. They further argue that Tarle was not constructively discharged; she did not resign her position until after she had obtained another job. They argue that Rupnik's review of Tarle was not gender-based, but simply identified flaws in Tarle's behavior in relating to superiors. Finally, they argue that the review was not retaliatory, in that the information it contained had been prepared prior to Tarle's DFEH complaint.

On December 21, 2007, Tarle filed a complaint against defendants alleging 13 causes of action. Several causes of action were ultimately dismissed. The remaining causes of action, at issue in this appeal, are those for retaliation in violation of the Fair Employment and Housing Act (FEHA) and public policy; gender discrimination in violation of FEHA and public policy; gender harassment in violation of FEHA; wrongful termination in violation of public policy; and assault (relating to an incident in which Sedani threw papers at Tarle).²

On December 12, 2008, defendants filed their motion for summary judgment. It was supported by evidence and a separate statement of undisputed facts. Tarle opposed

¹ A few days after Tarle resigned, she received a letter informing her that Kaiser's investigation concluded that there was insufficient evidence to support her charges of discrimination, harassment, and retaliation.

² Tarle also alleged a cause of action for defamation. On appeal, Tarle "does not challenge the [summary adjudication] ruling on her cause of action for defamation."

the summary judgment motion. In support of her opposition, Tarle submitted over 750 pages of evidence. Her evidence included, but was in no way limited to, so-called “me too” evidence, testimony from four other women, who testified to being the victim of, or observing, discriminatory and/or harassing conduct from Sedani and/or Rupnik.

Tarle’s opposition gave rise to a substantial number of evidentiary objections. On May 15, 2009, defendants submitted 200 pages of objections, consisting of 335 separate objections. Most of the objections asserted multiple grounds. A typical objection (objection 330) stated, “Irrelevant (Evid. Code §§ 210, 350-351); hearsay (Evid. Code § 1200); improper legal opinion (Evid. Code § 800); lacks personal knowledge (Evid. Code § 403(a)); lacks foundation (Evid. Code § 403); speculative (Evid. Code § 702).”³ Defendants included many objections to the “me too” evidence. While they interposed specific objections to specific excerpts from the testimony, they also objected to the “me too” deposition excerpts *in their entirety* on the basis of relevance.

Defendants’ objections were filed on May 15, 2009, along with their reply. The hearing on the summary judgment motion was set for June 4, 2009. Tarle did not file any opposition to the objections, nor request a continuance for additional time in which to prepare a written opposition.

Ultimately, the hearing was held on June 11, 2009. Prior to the hearing, the parties were provided with the court’s tentative ruling, which was to grant the motion

³ The objections were in the format required by California Rules of Court, rule 3.1354.

for summary judgment. The tentative ruling indicated that 13 of defendants' objections (identified by number) were overruled, and the rest were sustained. At the hearing, Tarle's counsel specifically argued that sustaining the objections to the so-called "me too" evidence constituted reversible error. Tarle did not argue against any of the other tentative rulings on defendants' objections.

The hearing was ultimately continued, however, to allow for Tarle to receive additional discovery, and submit additional briefing based on that discovery. On August 14, 2009, Tarle filed supplemental points and authorities in opposition to the summary judgment motion. Although the supplemental briefing was permitted in order to allow Tarle to address the additional discovery she had received, she spent the bulk of the brief addressing the court's tentative ruling against her. She again argued for the admissibility of her "me too" evidence, but did not address other evidentiary rulings.

A second hearing was held on February 19, 2010. At the hearing, Tarle argued for the admissibility of the "me too" evidence, and also argued for the admissibility of an additional piece of evidence, against which a hearsay objection had been interposed and tentatively sustained. Tarle did not argue against any of the other evidentiary rulings which went against her in the court's tentative ruling of the previous June.

The trial court adopted its tentative ruling and granted the motion for summary judgment.⁴ The court concluded that Tarle could not establish a prima facie case of gender discrimination. Specifically, the court concluded that there had been no adverse employment action or constructive discharge, and there was no evidence of

⁴ The court stated this ruling was "[n]ot the easiest call I've made in my career."

discriminatory motive. Similar conclusions were reached with respect to Tarle's causes of action regarding harassment and retaliation.

As to the objections, the court's ruling expressly sustained all but 13 of defendants' objections. The ruling specifically addressed Tarle's "me too" evidence, stating, "The conclusory opinions of third parties regarding the reasons why they believe Defendants treated them a certain way have no bearing on this case as to whether Plaintiff was in fact unlawfully discriminated against." However, as the court's ruling sustained all of defendants' objections, except the 13 it overruled, the trial court necessarily sustained defendants' relevance objections to the "me too" evidence *in its entirety*, not merely the specific objections addressed to the witnesses' conclusory opinions. In other words, the court sustained relevance objections to the other women's testimony as to the specific ways in which Sedani and/or Rupnik treated them, in addition to their testimony as to their belief that such treatment was motivated by gender bias.⁵

⁵ The law is clear that "me too" evidence is, in fact, admissible. A trier of fact can infer a discriminatory motive from similar conduct addressed to individuals sharing the same protected classification. (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 112; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 745, 767.) Thus, the trial court erred to the extent it struck *all* of the "me too" evidence as irrelevant. That Sedani and/or Rupnik treated other women in the same manner that they treated Tarle, but were not seen to treat men in the same fashion, gives rise to an inference that their mistreatment was motivated by gender bias. However, we have no quarrel with the trial court's stated rationale, that "conclusory opinions" of the women as to why they believe they were mistreated are irrelevant. In other words, had the court simply sustained objections to the "conclusory opinions" (and any other specific "me too" evidence which was separately objectionable), the court would have been correct. Sustaining a blanket objection to all of the "me too" evidence was simply overbroad.

Judgment was entered in favor of defendants. Tarle filed a timely notice of appeal.

On appeal, Tarle challenged, for the first time, the court's ruling on the great bulk of defendants' objections. For example, she argued for the first time that defendants had improperly objected to evidence which defendants had themselves relied upon. She also argued, for the first time, that the objections failed to specify adequate reasons. In addition she argued, for the first time, that many of the objections were frivolous.

Tarle argued, also for the first time, that the trial court's ruling on the objections was insufficiently specific to enable adequate appellate review.⁶ She argues that we should therefore reverse; or, in the alternative, reverse for specific rulings on each objection. At another point, she argues that we should simply consider all of her evidence on appeal, objectionable or not – on the basis that it is too burdensome to consider the merits of the trial court's ruling on each individual objection.

We sought additional briefing on the issue of whether Tarle's challenges to both the alleged procedural improprieties of defendants' objections (e.g., too many objections, lacking specificity) and the substantive merits of the rulings on the objections (e.g., the objections were frivolous, or objected to evidence defendants had

⁶ While, in many cases, a litigant does not know that the court will rule on objections against it *en masse* until the ruling is actually entered, Tarle had seen the trial court's tentative ruling prior to the June 2009 hearing and was given the opportunity to argue against it. She again argued against the tentative ruling when she submitted her supplemental briefing. She argued against it for a third time, at the February 2010 hearing. At no point did she suggest that the *en masse* ruling was in any way improper.

themselves introduced) were waived by Tarle's failure to raise them before the trial court.⁷ The parties submitted letter briefs as requested.

ISSUES ON APPEAL

This case presents the issue of whether a party can challenge, on appeal from a summary judgment, rulings sustaining objections to her evidence to which she never submitted oral or written opposition. We conclude that a party who fails to provide some oral or written opposition to objections, in the context of a summary judgment motion, is barred from challenging the adverse rulings on those objections on appeal. In the unpublished portion of this opinion, we turn to the issue of the proper disposition of this case. Although many of plaintiff's arguments are barred on appeal due to her failure to raise them before the trial court, the summary judgment procedure below, when viewed as a whole, was infected not only by some erroneous rulings by the court but, more significantly, by the multiple, voluminous, and often incomprehensible, motion papers filed by the parties. This flawed process produced a record that makes it impossible for this court to render a proper decision on the merits. We therefore will reverse the summary judgment and remand with directions for further proceedings.⁸

⁷ As Tarle had argued for the admissibility of the "me too" evidence before the trial court, there is clearly no waiver with respect to that evidence, at least with respect to the global objections.

⁸ Defendants, of course, are not *required* to pursue summary judgment on remand. We simply indicate that if they choose to do so, they may.

DISCUSSION

1. On Summary Judgment, Objections Must Be Opposed in Order to Challenge the Order Sustaining the Objections

In recent years, California courts have struggled with the situation of how a trial court is to respond when *hundreds of objections* are interposed challenging evidence submitted in support of, or opposition to, a summary judgment motion. The summary judgment statute permits evidentiary objections (Code Civ. Proc., § 437c, subd. (b)(3)) and presumes that a trial court will rule on them (Code Civ. Proc., § 437c, subd. (c)). For a time, there was appellate authority for the proposition that a trial court need not rule on the individual objections, but could simply state that, in its consideration of the summary judgment motion, it relied only on admissible evidence. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410.) Yet the appellate court which had decided that opinion subsequently reversed itself (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566) and our Supreme Court subsequently disapproved the initial opinion “to the extent it permits the trial court to avoid ruling on specific evidentiary objections” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 8). Thus, it is no longer in dispute that a trial court must expressly rule on each properly presented evidentiary objection. (*Id.* at p. 532.)

The law, however, has paid little attention to the duties, if any, imposed on a party opposing the evidentiary objections. Indeed, the governing statute (Code Civ. Proc., § 437c) and rules of court (Cal. Rules of Court, rules 3.1350-3.1354) do not even provide for a written opposition to written objections. Is a trial court, then, required to

rule individually on perhaps hundreds of objections, with the input and arguments of only the objecting party – with the proponent of the evidence free to remain silent and then challenge any adverse rulings on appeal? We believe the answer must be no.

It is the general rule that a party cannot raise a new theory on appeal unless the theory involves a purely legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence. (*People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 39-40.) While Tarle suggests evidentiary objections can be resolved on appeal de novo,⁹ this is not true with respect to any evidentiary argument which relies on the presentation of a foundation. Thus, for example, “ ‘if a hearsay objection is properly made, the burden shifts to the party offering the hearsay to lay a proper foundation for its admissibility under an exception to the hearsay rule.’ ”¹⁰ (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

⁹ Our Supreme Court has not yet decided whether “a trial court’s rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo.” (*Reid v. Google, Inc., supra*, 50 Cal.4th at p. 535.)

¹⁰ In this case, Tarle challenged, at the second summary judgment hearing, the tentative ruling on a single hearsay objection. Tarle argued that the statement in question was not hearsay as the declarant, a Kaiser employee, was authorized to speak on behalf of Kaiser. Had Tarle *not* argued that the declarant was authorized to bind Kaiser, the trial court would not have known the basis on which Tarle believed this apparent hearsay was admissible, and would have been correct to sustain the hearsay objection. Moreover, having argued that the employee could speak for Kaiser, Tarle then was required to direct the trial court to evidence establishing the foundation for her contention that the employee was so authorized. As she failed to do so, the trial court had no basis on which to overrule the objection. This illustrates the necessity of a

Moreover, the law is already established that when the proponent of hearsay testimony relies on a hearsay exception, that proponent must assert the specific hearsay exception under which the proponent argues the testimony is admissible. If not, the issue is not preserved for appeal. (*People v. Livaditis, supra*, 2 Cal.4th at pp. 778-789.) “In order to preserve the claim for appeal, the proponent has to have alerted the trial court to the exception relied upon” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282.) “Where, as here, a proponent of evidence does not assert a particular ground of admissibility below, he or she is precluded from arguing on appeal that the evidence was admissible under a particular theory. [Citations.]” (*Ibid.*)

We also note that our Supreme Court has stated that, in order to “counter [the] disturbing trend” of over-objecting at summary judgment, “at the summary judgment hearing, the parties—with the trial court’s encouragement—should specify the evidentiary objections they consider important, so that the court can focus its rulings on evidentiary matters that are critical in resolving the summary judgment motion.” (*Reid v. Google, Inc., supra*, at pp. 532-533.) We do not think the Supreme Court would have suggested this procedure if it believed that an opposing party could specify at the hearing the evidentiary objections it believed were important (in this case, those relating to the “me too” evidence) but then, on appeal, challenge the trial court’s rulings on hundreds of other evidentiary objections.

waiver rule in the context of any opposition to an objection which requires the establishment of a foundation.

We sought additional briefing on whether a waiver rule should be implied in this context. Tarle’s response raised three policy arguments which we briefly address. First, Tarle argues that, as a party is permitted to submit written objections as late as the reply papers (Cal. Rules of Court, rule 3.1354) and oral objections at the hearing itself, there is insufficient time for a written opposition to be prepared. Preliminarily, this was not so in the instant matter, where the written objections were submitted on May 15, 2009, and the hearing was ultimately held on June 11, 2009, and subsequently continued to February 19, 2010.¹¹ In any event, we are confident that trial courts will grant parties reasonable continuances to allow written oppositions to be filed, where properly sought. Moreover, we are not holding that *written* opposition to objections must be submitted in order to challenge on appeal the trial court’s ruling sustaining those objections. The argument in opposition must simply be before the trial court, whether via a written opposition, oral argument at the hearing, or even in the party’s written submissions in connection with which the evidence was proffered.¹²

Second, Tarle argues that imposing a requirement of opposing objections, at risk of waiving the opposition, is unduly burdensome. We disagree. Tarle’s concern is apparently that parties, such as defendants in this case, submit excessive inconsequential

¹¹ Indeed, Tarle argued against one evidentiary objection for the first time at the February 19, 2010 hearing, and was in no way prohibited from doing so.

¹² For example, if the proponent of evidence in support of, or opposition to, a summary judgment motion anticipates a “foundation” objection, and therefore submits the evidence establishing a foundation along with the potentially objectionable evidence, explaining its purpose as such, that would be sufficient. The proponent of the evidence need not resubmit the foundational evidence and argument in opposition to the objection, if it was already before the trial court.

objections. Indeed, courts have recognized that this “has become common practice.” (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 532; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 289.) The courts have also recognized, however, that trial judges are not powerless to prevent the practice. A trial court has the inherent power to control the proceedings before it, and is encouraged to use that power when the written submissions get out of hand. (*Nazir v. United Airlines, Inc.*, *supra*, 178 Cal.App.4th at p. 290.) Our Supreme Court has recognized that litigants raising innumerable objections which relate to matters that are not pertinent to the resolution of the summary judgment motion “may face informal reprimands or formal sanctions for engaging in abusive practices.” (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 532.) If a proponent of evidence believes that the opposing party has flooded the court with numerous inconsequential objections, the proper course of action is to seek trial court intervention *at that time*, and obtain a ruling requiring the opposing party to exercise restraint. In other words, when faced with burdensome objections, a party should challenge the objections as burdensome in the trial court; it is inappropriate to allow the trial court to rule on all of the objections (as is its duty), and then raise for the first time on appeal a complaint that the objections were too numerous to be properly considered by the trial court.

Third, Tarle argues that it is unjust for an appellate court to uphold a summary judgment based on evidentiary rulings which the appellate court knows were erroneous (and which were established to be error on appeal). We believe, however, that it is equally unjust for a party to lead a trial court to make an erroneous ruling on an

evidentiary objection by failing to suggest to the court a basis on which the evidence is admissible, and then raise the argument for the first time on appeal. Trial courts are not mind-readers. When an evidentiary objection is raised, and the proponent of the evidence fails to call to the court's attention a theory on which the evidence is admissible,¹³ additional evidence which establishes a foundation for the challenged evidence, or an argument for limited admissibility for a particular purpose, those arguments in opposition must be considered waived.¹⁴ Similarly, when the proponent of the evidence wishes, like Tarle, to challenge the objections as not being sufficiently specific to enable the court to rule, or as being unduly numerous and burdensome, the trial court (and the objecting party) must be given an opportunity to address these challenges prior to the trial court's ruling on summary judgment, where they can best be addressed and, if necessary, the objections corrected.

In sum, Tarle's policy arguments against the imposition of a waiver rule in this context are unpersuasive. We see no reason to treat evidentiary rulings different from any other ruling: an appellant who does not raise an argument before the trial court is barred from raising it for the first time on appeal.

¹³ We note, in this context, that Tarle argues that much of the evidence to which defendants interposed objections had been relied upon by the defendants. If Tarle had raised this waiver issue before the trial court, it could have been addressed at that time.

¹⁴ We emphasize that this rule applies only in the summary judgment context. Different considerations apply to objections made during trial.

2. *Procedure on Remand*

Having concluded that Tarle is subject to a rule of waiver with respect to the vast bulk of her evidentiary arguments, we must now consider how to resolve this appeal. While it is clear that Tarle failed to oppose evidentiary objections that she should have opposed, a more detailed review of the procedural history of this case establishes that both parties are equally at fault for the state of the record. This case never should have reached the point where Tarle was faced with the prospect of responding to hundreds of multi-part evidentiary objections or risk waiving them. It would be unjust, in these circumstances, for Tarle alone to suffer the consequences.

We begin with defendants' motion for summary judgment, and, more specifically, their separate statement of undisputed facts. Code of Civil Procedure section 437c, subdivision (b)(1) provides that a separate statement shall "set[] forth plainly and concisely all material facts which the moving party contends are undisputed." Defendants' separate statement set forth as "undisputed material facts" items which were not facts, but were rather allegations or statements of opinion.¹⁵ For example, defendants assert it was undisputed that "Plaintiff admits Sedani never said anything to her about her being a female." This is not a fact; the corresponding fact

¹⁵ It also set forth as "undisputed material facts" items which were not material. For example, defendants, over the course of four purported "material facts," state that it is undisputed that Tarle interviewed with Rupnik for one position, but was ultimately hired by Rupnik and Sedani for another. Tarle would ultimately dispute this fact, arguing that she interviewed for only one position in the department. We fail to see the materiality of this dispute (and therefore, these facts). It is undisputed that Tarle was hired by Rupnik and Sedani; whether she applied for a different position first is completely immaterial to her causes of action.

would be: “Sedani never said anything to plaintiff about her being a female.” The *fact* would be evidenced by Tarle’s admission; the admission itself is not a fact. While the distinction is not particularly significant in this instance, it is critical when defendants take the position that the corresponding fact is untrue.¹⁶ Thus, defendants assert it is an undisputed fact that “Plaintiff claims she was physically afraid of Sedani at her first one-on-one meeting because she felt he was angry.” Defendants do not agree that Tarle was afraid of Sedani, nor do they agree that Sedani was angry. What, then, are they asserting as an undisputed *fact*? Are defendants here attempting to claim that it is undisputed that plaintiff bases her allegation of fear *solely* on her perception that Sedani was angry? This is not an undisputed fact, but defendant’s paraphrase of a contention with which defendants disagree. Moreover, it is a vast oversimplification of Tarle’s deposition testimony cited in support of the purported fact.

Tarle submitted over 750 pages of “evidence” in support of her opposition to the summary judgment motion. Her opposition to defendants’ separate statement was

¹⁶ We assume that defendants proceeded in this fashion so that they could argue, on summary judgment, that the facts on which Tarle relied are insufficient to state a cause of action, without actually admitting that Tarle’s facts are true. We note that a statement in a separate statement of undisputed facts cannot be used against the proponent of the separate statement at trial. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747-749.) In other words, a defendant moving for summary judgment can assume, for the purposes of the motion, that the facts as plaintiff views them are true, and still retain the right to argue that the facts are otherwise at trial. Had defendants proceeded along these lines, they would have avoided the situation in which they relied on certain evidence to support the “material facts” that plaintiff *believes* certain events occurred, and then objected to the very same evidence when plaintiff relied on it to establish that the events *actually* occurred.

lengthy and, in many respects, clearly over-inclusive.¹⁷ We cannot, however, entirely fault Tarle for the length of her opposition; it was caused in great part by defendants' inclusion of contentions, rather than facts, in their separate statement. For example, defendants' undisputed fact 45 reads, "Plaintiff's belief that she was treated differently on the basis of her gender is based on her belief that Sedani treated her differently from the males in her department and because Sedani approved her [purportedly negative] performance evaluation." Tarle's response begins, "Disputed. There is a mountain of evidence of gender bias against Dilip Sedani creating triable issues of fact." The response to this one "material fact" goes on for 39 pages. It is so long that it has subheadings (A through K), sub-subheadings, and bullet points. While this, at first, appears to be an improper attempt to include legal argument in a separate statement, it is in some way understandable. Defendant's undisputed fact 45, in effect, asserted that it was undisputed that Tarle's cause of action for gender discrimination was based on two simple facts; it is no surprise that Tarle responded that her cause of action was based on a great many things. Thus, the fact that Tarle provided every scrap of evidence she possessed in opposition to the summary judgment motion was caused, in large part, by the fact that defendant's motion papers had asserted oversimplified characterizations of Tarle's contentions as "undisputed material facts."

¹⁷ Indeed, at one point, she *agrees* that two facts are undisputed, but nonetheless cites three deposition excerpts in support of her response. She frequently responded with evidence which was unrelated to the dispute she was arguing. Thus, in her lengthy opposition to the proposed material fact, "Plaintiff claims she was physically afraid of Sedani at her first one-on-one meeting because she felt he was angry," Tarle included evidence of such facts as "The April 18, 2006 outburst was in the presence of Wayne Rupnik" and "This was reported to HR"

Turning to defendants' objections, it is apparent to this court that many of the objections were over-inclusive. For example, defendants objected, in objection 6, to the following testimony of Tarle's:

"Q And can you describe that circumstance where in January of 2006 [Sedani] told you to get out of his office?

"A Yes. I came in and I asked – he said, 'Well, do you have any documents for me?' And I didn't know what that meant. I said, 'I don't know what you mean, do I have any documents for you.' He goes, 'Well, you can just get out of my office if you don't have anything for me. I don't want you in here,' in those very angry tones like that and said, 'Get out.' So I left his office."

Defendants objected to this testimony as speculative, improper opinion, conclusory, and lacking foundation. While Tarle's characterization of Sedani's "tones" as "very angry" was *conceivably* objectionable,¹⁸ the objection was not limited to the possibly improper characterization (with the remainder of the testimony provided only for context); instead, defendants objected to the entire deposition excerpt.

In short, it is clear that Tarle failed to oppose evidentiary objections she should have opposed. It is also clear, however, that defendant made numerous overbroad objections which they should not have made. It is further clear that defendants' numerous objections were caused by Tarle's proffer of a great deal of evidence, much

¹⁸ "We review for an abuse of discretion a trial court's ruling that a question calls for speculation from a witness." (*People v. Thornton* (2007) 41 Cal.4th 391, 429.) It is within the court's discretion to determine whether the lay opinion would be helpful to a clear understanding of the witness's testimony. (*Ibid.*)

of which was inadmissible *in part*. Finally, it is clear that Tarle's oversubmission of evidence was caused, in part, by defendants' separate statement of undisputed material facts including a great deal of items which were neither material nor facts. As a general rule, when a party's summary judgment papers are not in compliance with the law or rules, the proper remedy is to give the party an opportunity to cure the error. (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 74.) In this case, both parties are to blame for the briefing on this summary judgment motion spiraling out of control. It would be unjust, in these circumstances, for Tarle alone to suffer the consequences.

When we look at the record and attempt to consider all of the evidence which may be admissible, we cannot determine as a matter of law that Tarle does not have a viable cause of action.¹⁹ We therefore will reverse, and remand with directions that defendants may refile a motion for summary judgment, based only on purportedly undisputed material facts. A properly briefed motion for summary judgment is the only way to achieve justice in this case.

¹⁹ As the trial court intimated, this is a very close case on summary judgment.

DISPOSITION

The judgment is reversed. The matter remanded to the trial court to provide to the parties the opportunity to refile and oppose a new and properly prepared motion for summary judgment (should defendants choose to file one) and then to conduct such further proceedings as may be appropriate and not inconsistent with the views expressed herein. The parties are each to bear their own costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.